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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW S. JORDON,

Defendant and Appellant.

B207811

(Los Angeles County
Super. Ct. No. VA102449)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William J. Birney, Jr., Judge. Affirmed.

Law Offices of Bob Farahan and Babak Bobby Farahan for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant
Attorney General, Kenneth C. Byrne and Blythe J. Leszkay, Deputy Attorneys
General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Matthew S. Jordon of two counts of carjacking (§ 215, subd. (a))¹ and two counts of attempted robbery (§§ 664/211) and found that he had personally used a firearm (an Uzi) during commission of the crimes (§ 12022.53, subd. (b)). The trial court imposed a 19-year state prison sentence.

In this appeal, defendant contends that the trial court erred in denying his motion to exclude evidence of the victim's extrajudicial identification because the photographic six-pack was impermissibly suggestive. We disagree. In addition, defendant contends that evidence seized in violation of the Fourth Amendment was improperly admitted at trial and that the prosecutor committed misconduct during closing argument. Neither of these contentions has been preserved for appellate review: defense counsel did not file a motion to suppress evidence (§ 1538.5) and did not object during the prosecutor's closing argument. In the alternative, defendant contends that trial counsel provided ineffective representation because he failed to preserve the two contentions. We are not persuaded that trial counsel failed to perform as a reasonably competent attorney. We therefore affirm the judgment.

STATEMENT OF FACTS

At approximately 4:00 a.m. on September 10, 2007, Michael Oliver (Oliver) stopped at a Shell gas station in Lakewood. The gas station was well-lit. Oliver began to fill his car with gasoline. Defendant walked up to him and demanded cash. Oliver indicated he had no money. Defendant, pointing an Uzi at Oliver, stated "Hey, mother fucker, I want your cash" and "I am going to take your car."

¹ All statutory references are to the Penal Code.

Defendant threw the gas pump to the ground, jumped into the car, and quickly drove off. The confrontation lasted six or seven minutes.

The gas station attendant contacted the police who arrived within five minutes. Oliver gave the police a detailed description of defendant: skin “color not real black, not real white, but this light skin,” little facial hair, thin mustache, beady eyes, and an angular face “like a ‘V’.” Oliver told them that he would “never, never forget the shape of his face, his whole head” and that if he saw his assailant again, he would be able to identify him. In addition, Oliver told the police that defendant was 20 to 25 years old, about six feet tall, weighed 160 to 170 pounds and wore dark clothes.

While speaking with Oliver, the police received a call about suspicious activity in the alleyway behind the gas station. Los Angeles Deputy Sheriff Daniel Rudd went to the alley and saw a Jaguar. The vehicle was facing out of the alley. Its lights were off but the motor was running and the hood was slightly open. Nobody was in the driver’s seat but a man, subsequently identified as Andre Reed, was in the passenger seat. Deputy Rudd saw a cell phone (later determined to belong to defendant) lying on the roof of the Jaguar. The deputy picked the phone up and looked through its photographs, finding an individual he believed matched Oliver’s description of the robber. (As will be explained below, defendant contends that the seizure and search of his cell phone violated the Fourth Amendment.)

Pursuant to a request from the police, Oliver went to the alley. First, Oliver was asked if Reed was the man who had robbed him. Oliver replied in the negative (Reed was “too black”). Next, Deputy Rudd showed Oliver two of the cell phone photos after admonishing him that “this could or could not be the person, use your best judgment, don’t be influenced just because I am showing you the picture or the person.” Oliver was not sure if the man in the first photo was the

person who had robbed him² but he immediately recognized the man in the second photo as his assailant “because of the face.” (This identification procedure occurred approximately 45 minutes after commission of the crimes.) At about the same time, the police located Oliver’s car, abandoned two blocks from the crime scene.

Later that morning between 9:30 and 10:30 a.m., the police presented a six-person photographic six-pack to Oliver. The six-pack included defendant because, by this point, the police had determined that defendant was the registered owner of the Jaguar found in the alley behind the gas station. The police orally admonished Oliver that “[t]he person that was involved in this may or may not be in these pictures. [¶] If you see somebody that you recognize, that’s fine. If you don’t see anybody in these photos that you recognize, that’s fine as well.” In addition, Oliver read and signed a written admonition.³ Oliver selected defendant in seconds (“It jumped right out at [him]”). When asked at trial if he selected defendant’s photo because he “had seen him in the cell phone” or because he “had seen that guy carjack [him] at the gas station,” Oliver replied: “That’s the face I saw at the gas station.”

Defendant was arrested approximately two weeks later. At trial, Oliver unequivocally identified defendant as his assailant. He explained that he had

² The photo was, in fact, of defendant with some children.

³ On our own motion, we have augmented the record on appeal to include all of the trial exhibits. (Cal. Rules of Court, rule 8.155 (a)(1)(A).) One such exhibit is the admonition Oliver signed before viewing the photographic six-pack. It reads: “You will be asked to look at several photographs. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs necessarily contain the picture of the person that committed the crime. You are not obligated to identify anyone. It is just as important that innocent persons are freed from suspicion and that guilty parties are identified.”

looked at defendant throughout the confrontation and that he “will never forget” “his eyes and his face.”

At trial, defendant relied upon a defense of misidentification. To that end, defense counsel cross-examined Oliver about his identification of defendant and cross-examined the police officer witnesses about the description Oliver gave them as well as the identification procedures, including the preparation of the photographic six-pack. In addition, the defense presented an expert witness who testified about the factors that can influence the reliability of an identification. These include stress, the presence of a weapon, the use of photographic six-packs (including use of a cautionary admonition), the passage of time between the event and the identification, and the witness’s confidence in his identification. Defendant did not testify. In closing argument, defense counsel argued Oliver had misidentified defendant as a result of a “suggestive and impermissible tainted identification procedure.”

DISCUSSION

A. DENIAL OF DEFENDANT’S MOTION THAT THE PHOTOGRAPHIC SIX-PACK WAS UNDULY SUGGESTIVE

Defendant first contends that the trial court erred when it denied his pretrial motion to exclude Oliver’s identification of him in the photographic six-pack. We are not persuaded.

1. Factual Background

Before trial, defendant moved to exclude “evidence of [the] two photo identification procedures and a subsequent in-court identification based on the fact that . . . the photo identification procedures were of an inherently suggestive manner violative of [the] right to a fair trial.” After hearing argument from counsel

and reviewing the photographic six-pack, the trial court rejected the defense claim that the identification procedure was “fatally flawed.” The court ruled: “In our search for truth, I think it would be somewhat unfair and somewhat limiting to exclude from the jury the entire [identification] scenario. And I am disinclined to piecemeal it and allow, for example, the six-pack but not the cell phone [identification]. [¶] I think the jury should hear it in its entirety. [¶] *I don’t think there is anything unfair about the six-pack.*”⁴ (Italics added.)

2. Analysis

Defendant contends that “[t]he suggestive nature of the [photographic] lineup violated [his] right to due process of law and resulted in an irreparable misidentification of [him] as the perpetrator of the carjacking.”

Whether a pretrial photographic identification is constitutionally reliable depends on: ““(1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification

⁴ This record disposes of defendant’s contention that trial counsel failed to provide effective representation because he failed to “challenge or object[] to the six-pack identification evidence.” He did, in fact, make that challenge, albeit unsuccessfully. Consequently, the issue is, as will be discussed above, whether the trial court’s denial of the defense motion was error.

constitutionally unreliable.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

“The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citation.] ‘The question is whether anything caused defendant to “stand out” from others in a way that would suggest the witness should select him.’ [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) “[T]he standard of independent review applies to a trial court’s ruling that a pretrial identification procedure was not unduly suggestive.” (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

We have examined the photographic six-pack. (See fn. 3, *ante.*) The six photographs are of men of similar ages and ethnicities. Each man has braided hair and a thin moustache. Nonetheless, defendant complains that the photographic six-pack was unduly suggestive because of the six men, he was “the only person with light skin” and “the only one with angular features.” We disagree. By its nature, the description “light skin” is comparative. In this six-pack, the men’s skin complexions vary in terms of “lightness.” Two, if not three, meet Oliver’s description given to the police of an individual who is “light skinned, color not real black, not real white.” We therefore reject defendant’s argument that he was “the *only* person with light skin.” (Italics added.) While defendant is correct that his photo showed the lightest skin, that did not render the photographic display suggestive because that fact did not cause defendant’s photo to stand out from the others in such a way to suggest improperly to Oliver that he should select defendant. Further, defendant’s claim that he was the only man shown with angular features is not correct. One, if not two, of the other men had angular features. “Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to ‘stand out’ from the others in a way that would suggest the witness should select him.” (*People v.*

Carpenter (1997) 15 Cal.4th 312, 367.) In this case, nothing improperly caused defendant to stand out. We therefore conclude, exercising our independent review of the trial court’s ruling, that the photographic six-pack was not unduly suggestive.

In any event, “there must be a ‘substantial likelihood of irreparable misidentification’ under the “‘totality of the circumstances’” to warrant reversal of a conviction on this ground. [Citation.]” (*People v. Cunningham, supra*, 25 Cal.4th at p. 990.) In this case, there is no substantial likelihood that Oliver misidentified defendant when he viewed the six photographs. The confrontation between defendant and Oliver lasted six to seven minutes. It took place in a well-lit area. Oliver had ample opportunity to view defendant because they were face to face the entire time. Prior to examining the photos, the police told Oliver that he was not to assume that the person who committed the crimes was pictured and that he had no obligation to identify anyone. The identification procedure occurred approximately six hours after the crimes, when Oliver’s memory was fresh and clear. Without equivocation, Oliver identified defendant in four seconds. Based upon this record, defendant has not met his burden of establishing, under the totality of the circumstances, an unreliable identification procedure.

B. SEIZURE AND SEARCH OF THE CELL PHONE

Defendant contends that his “conviction must be overturned due to illegal search and seizure” of his cell phone. (Capitalization and boldface omitted.) He argues that the fruit of that action—Oliver’s identification of defendant on the one cell phone photo—must be suppressed and that without that identification, his conviction cannot stand. Defendant’s failure to make a motion to suppress evidence (§ 1538.5) in the trial court constitutes a forfeiture of his right to raise this claim on appeal. (*People v. Hart* (1999) 74 Cal.App.4th 479, 483-484.)

Anticipating that conclusion, defendant next contends that trial counsel was constitutionally ineffective for failing to preserve for appeal the issue of the legality of the seizure and search of his cell phone. We are not persuaded.

“To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant in the sense that it ‘so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ [Citations.] If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel’s performance was deficient. [Citation.] If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citation.]” (*People v. Kipp* (1998) 18 Cal.4th 349, 366-367.)

When a claim of ineffective representation is based upon a failure to file a suppression motion, “[i]f the search was invalid, failing to preserve the issue constituted deficient performance when measured against the standard of a reasonably competent attorney. [Citation.] Furthermore, the failure to preserve the issue of the legality of the search is prejudicial to the defendant if there would not have been sufficient evidence, otherwise, to convict. [Citation.] Hence, to determine whether counsel was constitutionally ineffective for failing to preserve the issue, we must consider the merits of the Fourth Amendment argument.” (*People v. Hart, supra*, 74 Cal.App.4th at pp. 486-487.)

A search violates the Fourth Amendment only if the defendant had a legitimate expectation of privacy in the item seized and searched. The defendant

bears the burden of establishing that legitimate expectation. (*People v. Roybal* (1998) 19 Cal.4th 481, 507.) Because defendant had left his cell phone unattended on top of his car, the issue is whether he had abandoned his property, thereby relinquishing any Fourth Amendment claim.

“Property that is abandoned is no longer subject to Fourth Amendment protection because one does not have a reasonable expectation of privacy in property that has been abandoned.” (*People v. Pereira* (2007) 150 Cal.App.4th 1106, 1112.) For Fourth Amendment purposes, abandonment ““is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search. [Citations.]’ [Citation.] ““In essence, what is abandoned is not necessarily the defendant’s property, but his reasonable expectation of privacy therein.”” [Citation.] If the defendant has so treated the object as to relinquish a reasonable expectation of privacy, it does not matter whether formal property rights have also been relinquished. [Citations.]” (*In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1048.) A defendant’s “*intent to abandon is determined by objective factors, not the defendant’s subjective intent.*” ““Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other *objective* facts.”” (*People v. Daggs* (2005) 133 Cal.App.4th 361, 365-366, italics added.)

Here, defendant, at four in the morning, left his cell phone on the roof of his car (as opposed to inside of the car with Reed). The car, with the cell phone on its roof, was in a public place: an alley behind a gas station. Defendant walked away from the car (to rob Oliver), leaving the car door open but with the motor running. Based on these facts, defendant relinquished any *reasonable* expectation that a police officer who came upon this scene would not pick up the phone and peruse its contents. Because defendant had abandoned the cell phone, the property was no

longer protected by the Fourth Amendment. A suppression motion would have been fruitless. Since trial counsel is not required “to indulge in idle acts to appear competent” (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091), failing to file a suppression motion did not constitute ineffective representation.

In any event, assuming such a motion should have been brought and that it would have been granted (conclusions we do not make), defendant was not prejudiced by trial counsel’s failing. All that would have been suppressed was Oliver’s identification of defendant in one cell phone photo.⁵ But the other evidence of defendant’s guilt was overwhelming. Oliver quickly and definitively selected of defendant from the photographic six-pack and unequivocally identified him in court.

C. PROSECUTORIAL MISCONDUCT

Lastly, defendant contends that the prosecutor committed prejudicial misconduct during closing argument. Defendant claims that 23 statements made by the prosecutor were improper. However, defendant failed to object any of the

⁵ Defendant makes the passing argument that the Oliver’s identification of him in the photographic six-pack was a fruit of the allegedly wrongful identification made through the cell phone photo. Defendant posits that “[b]y showing [Oliver] the phone picture then manipulating [Oliver] to identify [defendant] by having only one light-skin African-American in the six-pack, the police were able to fill in the mouth, nose, eyes, ears, and hair with the features of the person they suspected to be the perpetrator. [¶] Had the cell phone photograph not first been shown to [Oliver], the error of the six-pack may not have been as damaging. But, once the image was implanted into the brain of [Oliver], the error magnified the taint and neutralized impartiality of the six-pack identification.” This argument is not persuasive for several reasons. For one, it is based on a claim we have already rejected: that the photographic six-pack was impermissibly suggestive. For another, it overlooks Oliver’s testimony that his identification of defendant in the six-pack was based upon the observations he made during their confrontation, not upon the cell phone identification. And lastly, it ignores the detailed description of defendant that Oliver gave the police, as well as Oliver’s unequivocal courtroom identifications of him as his assailant.

statements. This constitutes a forfeiture of the contention. ““A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.”” (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) To avoid this conclusion, defendant asserts that trial counsel’s failures to object constitute ineffective representation of counsel. To preclude a subsequent collateral attack on the judgment based upon that claim, we shall address the point.

To establish ineffective representation, a defendant must show that trial counsel’s performance was “deficient when measured against the standard of a reasonably competent attorney.” (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) As set forth earlier, a reasonably competent attorney is not required to make meritless objections. We shall now explain why none of the prosecutor’s comments was misconduct; ergo, trial counsel was not ineffective for failing to object to any of the remarks.

Defendant first urges that the prosecutor made numerous statements which “a normal intelligent person would understand . . . made guilt a fact on which discussion was not needed.” That is, he claims that the prosecutor urged that guilt was “an undisputable fact.”⁶ We disagree. “[I]t is within the domain of legitimate argument for a prosecutor . . . to relate to the jury that, in [her] opinion, the

⁶ For instance, defendant cites to the following statements to support his claim of prosecutorial misconduct: (1) “[T]he evidence shows that the defendant, along with his buddy Mr. Reed, went out, attempted to rob Mr. Oliver”; (2) “So once you find the defendant guilty . . . then you find the special allegation true . . . because we know that the defendant used the Uzi in this case”; (3) “Now we know Mr. Oliver had possession of the vehicle [taken from him]”; (4) “So even if the defendant had dumped [Oliver’s] car at the end of the parking lot, or as he did here a few blocks away, that is still a completed carjacking.”

evidence shows that the defendant is guilty of the crime charged” (*People v. Dillinger* (1968) 268 Cal.App.2d 140, 144) as long as the argument is based on the evidence presented at trial (*People v. Lopez, supra*, 42 Cal.4th at p. 971). Here, each of the statements about which defendant complains was based upon either the evidence or a reasonable inference to be drawn from the evidence. That the prosecutor sometimes prefaced her statement with the phrase “we know” did not render the statement improper.⁷ (See *People v. Roberts* (1992) 2 Cal.4th 271, 310.)

Defendant next argues that at several points the prosecutor improperly vouched for Oliver’s credibility. The argument fails because it is based upon an incorrect understanding of the law. Improper vouching occurs when “the prosecutor places the prestige of the government behind a witness through personal assurances of the witness’s veracity or suggests that information not presented to the jury supports the witness’s testimony.” (*People v. Fierro* (1991) 1 Cal.4th 173, 211.) But defendant concedes the prosecutor never did that. Defendant states: “Although the prosecutor did not say a particular witness’s testimony was credible and should be believed, [s]he did say, for example, ‘We know . . .’ certain things testified to are unequivocal facts. This is the same as vouching because the jury knew which witness said what and they knew the prosecutor was saying the testimony was true. This is vouching.” As explained above, that the prosecutor prefaced some of her statements about the facts established by Oliver’s testimony with the phrase “we know” was not improper and certainly did not amount to vouching for his testimony.

Lastly, defendant claims that the prosecutor referred to matters outside the record and that she improperly disparaged him. We have examined the statements upon which defendant relies; they do not support these claims.

⁷ Pursuant to CALJIC No. 1.02, the jury was instructed that “[s]tatements made by the attorneys during the trial are not evidence.”

In conclusion, we have read the entirety of the prosecutor's closing and rebuttal arguments and find that no misconduct occurred. Defense counsel was therefore not ineffective for failing to raise objections which the trial court would have certainly overruled.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.